

STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: TODD C.,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO.
	)	
DEKALB COUNTY BOARD	)	1985-2
OF EDUCATION,	)	
	)	DECISION OF
Appellee.	)	STATE HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal from a decision of a regional hearing officer that the DeKalb County Board of Education (hereinafter "Local Board") could serve Todd C. (hereinafter "Student") in a program for the orthopedically impaired rather than in the Student's normal home school and that the Local Board did not commit any violation of the Student's due process rights by failing to provide a specific individual education plan while the Student was mainstreamed. The Appellant contends the Regional Hearing Officer did not address whether the Local Board had failed to provide supportive aids and services reasonably calculated to allow the Student to be mainstreamed and acquire educational benefit, that the Regional Hearing Officer failed to properly apply the burden of proof in relation to the least restrictive environment, the Regional Hearing Officer

erred in determining the Local Board was not required to provide an IEP for the school the Student was currently attending, and the Regional Hearing Officer erred in not allowing the Appellant to challenge the method of selection of the Regional Hearing Officer.

The Local Board argues that they were not in violation of the law with respect to the current placement because they had been providing what the parents had requested, that the proposed program was appropriate, and the program desired by the parents was inappropriate. The State Hearing Officer holds that the decision of the Regional Hearing Officer is affirmed.

## PART II

### FACTUAL BACKGROUND

The Student in this case is a twelve year old male who is severely physically handicapped as a result of a near drowning when he was approximately two years old. The Student now has a form of cerebral palsy which has caused severe orthopedic and speech impairment. Additionally, the Student tested as functioning intellectually in the mild to moderate mentally retarded range, but the parents disputed the test results. He is presently able to learn many of the same tasks which kindergarten or first grade students are capable of learning and is of a similar stature to first graders. He was placed for the two years prior to the 1984-85 school year in a school (hereinafer "School with Special Services") in the local system

which had a program for the orthopedically impaired. The Student's parents were unsatisfied with the program, and, prior to the 1984-85 school year, they requested that the Student be allowed to attend the school which the Student would normally attend if he had no handicapping condition (hereinafter "Home School"). The Local Board personnel (hereinafter "Personnel") did not agree that the placement in the Home School was appropriate, but did agree to the placement. The Local Board did not provide special services in the Home School with the exception of speech therapy. By November of 1984, the Personnel determined that the Home School was not an appropriate placement for the Student and drew up a new IEP recommending placement in the program for the orthopedically impaired at the School with Special Services. The parents objected to the change in placement and requested a due process hearing, which was held on January 29 through February 1, 1985. The Hearing Officer issued his decision on March 21, 1985 and the parents requested this appeal on April 16, 1985. The parents, through their attorney, requested oral argument on appeal which was delayed upon agreement of the parties until May 30, 1985. The parties further agreed to grant the State Hearing Officer an extension on issuing his decision based upon the fact that the school year has concluded thus making the time for the decision significant only as it relates to the upcoming school year beginning in the fall of 1985.

The Regional Hearing Officer found that the program offered by the Local Board was appropriate and that placement in the Home School, even with the services requested by the parents, would not be appropriate. The Regional Hearing Officer based his decision that the program offered was appropriate on his findings that the goals and objectives of the November IEP were appropriate and his conclusion that those goals and objectives could be met in the orthopedic impairment program at the School with Special Services. The Local Board presented three witnesses who testified regarding the appropriateness of the School with Special Services. First, their Coordinator of Orthopedically Handicapped-Visually Impaired and Related Services, who has a certificate in teaching the orthopedically impaired as well as a certificate as a director of special education, testified that the School with Special Services was a regular elementary school with two classes for the orthopedically handicapped which was located four or five miles from the Home School. She further testified that the Student needed one-to-one individualized instruction, therapy on a regular basis, special communications training, speech and language and other special services which were available at the School with Special Services and not available at the Home School. Second, the classroom teacher for the orthopedically handicapped, who had been the Student's teacher for the 1982-83 and 1983-84 school years, testified that the Student

made progress in the program and was generally in the middle of her five students as far as ability went. Third, an assistant professor in the Department of Counseling and Psychological Services at Georgia State University testified that the Student could not be appropriately served in the Home School. The Local Board also presented various witnesses who testified about the problems the Student had while attending the Home School. They testified that the Student was limited in a regular classroom by a lack of handwriting skills, needed one-to-one instruction, needed assistance in walking, carrying his papers, and opening his books, was very distractable due to a short attention span, had regressed in his reading skills, and lacked the communication skills to participate with other students. Generally, they were unanimous in the opinion that the Student was not prepared to attend the Home School.

The parents, in order to support their position that the Student should attend the Home School, testified and presented a director of children's education from their church, a learning disability specialist, and a physical therapist. The Director of Children's Education testified that other children accepted the Student and he was able to participate in the regular third grade Sunday School class. The physical therapist testified that she had worked with the Student in the years prior to the Student's coming to the Local System and continued to work with him presently. She testified that the Student was

making a great deal of progress from the first time she had dealt with him, that the Home School could make minor modifications which would make it easier to assimilate the Student, and that the Student did not need one-to-one instruction all of the time, although he did generally need close supervision. The learning disabilities specialist testified that the Student needed physical therapy, and occupational therapy and that this was the best time, due to his age, for the Student to be mainstreamed in the regular class in the Home School. The Student's mother testified concerning the extreme efforts that had been made to work with the Student over the course of the Student's life and that, since the Student began attending the Home School, he had improved his personal care habits, became more interactive socially, had improved his writing, and had improved in his self esteem. She testified he did not progress as well at the School with Special Services. The Student's father testified that the child plateaued while at the School with Special Services and that the Personnel never mentioned the availability in the Home School of itinerant services.

### PART III

### DISCUSSION

In reaching a decision, the State Hearing Officer is required to support the decision of the Regional Hearing Officer absent a finding that the decision of the Regional Hearing Officer is not supported by substantial evidence (State Board

Policy JQAA, June 1984, Georgia Special Education Program Plan FY 1984-86). Of course, the decision must also be supported by the law and rules and regulations of the State Board of Education. The Regional Hearing Officer has the direct opportunity to listen to the testimony and from that testimony derive a conclusion concerning an appropriate placement.

Appellants contend that the Regional Hearing Officer erred because he did not address whether the Local Board had failed to provide supportive aids and services reasonably calculated to allow the Student to be mainstreamed and acquire educational benefit. In making this argument, Appellants contend that the Local Board is required to prove the Student cannot benefit from a mainstream experience and can benefit from a more restrictive educational environment. The requirement for an education in the least restrictive environment is one that is not subject to an exact determination but must be subjectively determined. The regulation which requires that a child be educated in the home school makes that requirement subject to modification if the IEP requires another arrangement (34 CFR § 300.552(c)) just as the regulation which requires that children be educated with nonhandicapped children makes that requirement subject to modification to the maximum extent appropriate. The restriction on the use of special classes is that they be used only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids

and services cannot be achieved satisfactorily. Thus, when an IEP is developed, the facts must be weighed and a determination made whether a more restrictive environment than the home school is required. This decision is based upon the appropriateness of mainstreaming and whether the severity of the handicap is such that education cannot be satisfactorily achieved in regular classes with the use of supplementary aids and services.

The parents initially requested that the Student be educated in the Home School as the school with the least restrictive environment and the Personnel consented with the understanding that special services, with the exception of speech therapy, would not be offered. The reason for the lack of special support services in the Home School is that the Local Board has determined it need not make all services available in every school and has provided the types of services needed by the Student in several schools in the county based upon the needs of the students in the county as a whole. The school in which the services are offered is a regular school which has additional special services. The Student can receive the special services required and also be mainstreamed for all or part of the day.

Essentially, the parents' request in this case is that the Home School be modified to approach the services of the Special School but, even if this were to be done, it would not



be promoting a less restrictive environment. The fact that one school is closer than another by four miles does not establish that it will provide greater mainstreaming with identical programs. The purpose of the least restrictive environment is to have the child associated with nonhandicapped children in a regular setting as much as possible and, hopefully, to move the child back into a regular classroom. The purpose of the home school requirement is to see that students are educated with nonhandicapped students as much as possible unless good reasons exist not to do so. The home school provision at least creates a presumption of mainstreaming which must be overcome in order to educate a student in other than the home school. It is generally considered that, if a student is educated in his home school, he will be more likely to receive the same services regular students receive.

In the present case, any service that could be offered in the Home School is already offered in the School with Special Services, even up to full mainstreaming. The School with Special Services is a regular elementary school. Indeed, the Student could attend that school without receiving any special services. Thus, the Student can, as the Regional Hearing Officer stated, have the best of both worlds. He can receive special services when and where needed and be mainstreamed when appropriate. The presumption, therefore, that the Student is more likely to receive the same services as regular students by only attending the Home School is invalid in the instant case.

The Local Board is not required to offer all services which a handicapped student might need in his home school. This statement should be evident from the accepted practices in education as well as from the regulations under the Education for All Handicapped Children Act. Some handicapping conditions are of such a low incidence rate that provisions for those conditions in every school would be prohibitively expensive. Thus, the regulations expressly recognize that an occasional residential placement may be necessary. It has long been the practice to offer some psychoeducational services only in specialized centers. Every service which may be needed is not going to be available in the Home School. The State Hearing Officer is of the opinion that the Local Board is able to centralize services to reach a reasonable size population in order to provide services. See, Pinkerton v. Moyer, 509 F. Supp. 107 (1981).

Inherent in the Regional Hearing Officer's decision that the Local Board offered an appropriate placement in the School with Special Services is the fact that that placement is in the least restrictive environment. The Regional Hearing Officer stated as the first purpose of the hearing a determination of whether the Student should remain in his current mainstream program in the Home School (with modification), or should be returned to a restrictive classroom for children with orthopedic impairments. The Regional Hearing Officer then determined that

the program offered by the Local Board included such desirable and needed services as direct occupational therapy and physical therapy. The determination that occupational and physical therapy were needed services, which was supported by the testimony presented, together with the State Hearing Officer's decision that not every service need be offered in the home school, justifies a decision that education in the regular classroom at the Home School with the use of supplementary aids and services cannot be achieved satisfactorily. Additionally, a determination by the Regional Hearing Officer that a placement is appropriate warrants a conclusion that the placement is in the least restrictive environment. The Regional Hearing Officer was made aware of the Appellant's contention that the placement in the School with Special Services was not in the least restrictive environment. His determination was to the contrary.

Thus, the Regional Hearing Officer's decision that the Local Board offered the Student an appropriate placement did address the issue of the least restrictive environment and was supported by substantial evidence in the form of testimony from witnesses presented by the school system. The testimony presented was sufficient for the Regional Hearing Officer to conclude that the Local Board offered an appropriate education and the testimony offered by Appellant's witnesses was not such as to require a conclusion to the contrary.

The determination in this discussion that the Local Board is not required to modify every school program to meet all the needs of the handicapped if an appropriate program is reasonably made available and that the Local Board did make such a program available supports the Regional Hearing Officer's decision regarding the appropriate placement for the Student in the fall. This was the major issue before the Hearing Officer and it was correct for him to make that determination.

Appellant's argument that the Regional Hearing Officer failed to address whether the Local Board had failed to provide supportive aids and services reasonably calculated to allow the Student to be mainstreamed and acquire educational benefit does not warrant reversal of the Regional Hearing Officer's decision. The Regional Hearing Officer addressed that question, although not directly, when he determined that the local system did not commit a procedural error regarding the Student's placement for the past school year. The Regional Hearing Officer determined that the program offered was as a result of an effort to accommodate the wishes of the parents. Clearly, the requirement of the Education for All Handicapped Children Act for parental consent for placement justifies an effort by the Local Board to attempt to accommodate the wishes of the parents. The Local Board did offer supportive aids and services but just offered them in a different school than requested by the parents. The parents chose not to take advantage of the services offered

in the School with Special Services but to place the Student in the Home School instead.

The Appellant further argues that the Regional Hearing Officer failed to properly apply the burden of proof in relation to the least restrictive environment. The Hearing Officer issued a preliminary ruling placing the burden of going forward with the evidence on the school system consistent with the decision in Wesley B. v. Murray County School District, C83-349R (U.S. D.C. N.D. Ga., Rome Div.). However, the Regional Hearing Officer decided that the Local Board had met the burden. This decision was made by viewing the evidence from the standpoint of what was in the best interests of the child and in accordance with the mandates of P.L. 94-142. The parents contend the Local Board's proof failed to include any data on educational gains or losses and, therefore, was insufficient. Additionally, they claim the proof was insufficient because the evidence was disputed.

The Regional Hearing Officer, however, gave careful consideration to the evidence presented and found that the Local Board had provided an appropriate program. The Local Board was required to proceed first with its evidence and established the Student's rate of progress and the benefits of the program at the School with Special Services. The Regional Hearing Officer had the responsibility of weighing the conflicts in

evidence. The State Hearing Officer concludes that the Local Board met its burdens of proof. Based upon the previous discussion that the Local System may choose to centralize its services and that an appropriate program was offered, the State Hearing Officer finds no reason for reversal based on the argument by Appellant that the Regional Hearing Officer improperly applied the burden of proof. The Regional Hearing Officer required the Local Board to present its case first and thus establish its evidence, and the Local Board provided ample evidence to sustain its burden.

Appellant's argument that the Regional Hearing Officer erred in determining the Local Board was not required to provide an IEP is without merit. The Regional Hearing Officer determined that there was an IEP in effect which provided speech and language services. Also, the Appellant expressly requested that Local Board personnel override the recommended IEP to provide a mainstream program in the Home School. The Local Board simply complied with the parent's wishes.

Finally, Appellants argue they should have been allowed to challenge the method of selection of the Regional Hearing Officer. The Regional Hearing Officer was presented with the argument that the parents should be entitled to include as an issue whether the Regional Hearing Officer was correctly selected in accordance with a rotation system. The Regional Hearing Officer determined that he did not have the authority to determine whether the State Department of Education had

complied with its own procedures and, since he had not been requested to recuse himself, he did not rule on the issue of recusal.

The Regional Hearing Officer was correct in determining that he did not have the authority to rule on whether the State Department of Education had complied with its own procedures. The Regional Hearing Officer is authorized to hold a hearing by the State Board of Education under Georgia Law O.C.G.A. § 20-2-1160(e) when a hearing is necessary to decide a complaint made under the Education for All Handicapped Children Act. The State Board of Education has issued rules and regulations consistent with the Education for All Handicapped Children Act entitling a parent to a hearing regarding the identification, evaluation, placement or provision of a free, appropriate public education to handicapped children. State Plan for Special Education, FY 1984-86. This hearing process is limited to those few areas: identification, evaluation, placement, or provision of a free, appropriate public education. Thus, there was no obligation for the Regional Hearing Officer to allow an investigation as to whether he was properly selected. He could have chosen to recuse himself if he felt a need but apparently saw no reason to recuse himself. Additionally, no reason was presented or has been presented by Appellants as to why the Regional Hearing Officer should have recused himself or how any irregularities in the selection of the Regional Hearing Officer would affect their rights.

Based upon the above, the record presented, and the briefs and arguments of counsel, the State Hearing Officer is of the opinion that there exists substantial evidence to support the Regional Hearing Officer's decision that the Local Board offered the Student an appropriate education in the School with Special Services. The decision of the Regional Hearing Officer, therefore, is hereby

AFFIRMED.

This 17<sup>th</sup> day of July, 1985.

*L. O. Buckland*

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L. O. BUCKLAND  
State Hearing Officer